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No. 610.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

Home Telephone and Telegraph Company,
Appellant,
vs.
The City of Los Angeles, et al.,
Appellees.

BRIEF OF APPELLEES.

FIRST.

STATEMENT OF CASE.

As appellant has stated, this is a bill filed in the Circuit Court to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Los Angeles, on the ground that the rates prescribed were confiscatory and, if enforced, would deprive complainant of its property without that due process of law

guaranteed by the fourteenth amendment. The ordinance continued in force for the ensuing year a schedule of rates not lower than one theretofore voluntarily established by complainant in its dealings with its patrons. But it was claimed that, based upon changed conditions, existing at the time of the passage of the ordinance in question, said ordinance was unjust and unreasonable. To the bill a plea was filed wherein it was made to appear that the constitution of the state of California contained a guaranty that no person should be deprived of property without due process of law. From this it was argued that if the defendant city had attempted to fix a confiscatory rate for telephone service, its action was unauthorized by the state, and was null, void and of no effect under the state law; that if the allegations of the bill were established, the ordinance must be declared void under the state law, and for that reason the suit was not one "which really and substantially involved a controversy as to the effect or construction of the constitution or laws of the United States, *upon the determination of which the result depended.*"

The plea having been confessed, the contentions of the defendant were upheld by the court and the bill dismissed for want of federal jurisdiction.

The correctness of the above ruling presents the question to be considered on this appeal.

SECOND.

BRIEF OF ARGUMENT.

I.

The Fourteenth Amendment is Directed Against Action by the States.

The fourteenth amendment is aimed at state action. It is not directed against persons, against cities or against bodies public or private other than states. It is much less comprehensive in scope than the guaranty of due process to be found in many state constitutions.

To maintain its claim to federal jurisdiction therefore appellant must show that the *state of California* has taken action which will operate to deprive it of its property without due process of law or that the *state of California* denies to it the equal protection of the law.

But we contend that

II.

The State of California has Taken no Action.

Has the state of California deprived appellant of its property without due process of law or denied to it the equal protection of the law? No action has been taken by the state government, or in the name of the state, or in behalf of the state, or by any officer of the state government. It is not claimed that the state has acted except

through the alleged instrumentality of an agent. Officers of the city of Los Angeles, a separate and subordinate subdivision of the state of California, have passed a certain ordinance, which the bill alleges, would operate to deprive complainant of its property without due process of law. The state of California, however, by a plain and unambiguous provision of its constitution, advises complainant, a citizen of the state of California, that its property may not be taken without due process of law, and tells complainant, in effect, that if the charge is true that the ordinance of the city of Los Angeles is confiscatory, then that ordinance is null, void and of no effect, and directly violates the mandate directed by the people of the state not only to every officer of the state, but to every agency, public or private, operating within the state. In the face of this declaration by the state—in the face of this limitation upon the authority of every agent of the state, plainly and publicly expressed and known to complainant, it nevertheless comes into the federal forum and charges *the state* with the alleged confiscatory act. This too, without any appeal to the principal and without any act of alleged ratification on the part of the principal.

When did it become the law that known limitations upon an agent's authority no longer operate to protect the principal? Is it a tenable legal proposition that an act beyond the known limits

of an agent's authority, not confirmed or ratified by the principal is nevertheless the act of the principal?

Is it true that the act of an agent, merely in the exercise of an agency, is the act of the principal, regardless of limitations upon the agent's authority?

As we read the brief on its behalf complainant grounds its entire case, in support of federal jurisdiction herein, upon an affirmative answer to the last question. In taking this position we contend that appellant has fallen into error. We submit that *limitations on* an agent's *authority* are still operative and that no action by the state of California is shown by this record. Let us first examine this matter on principle. We contend that:

(a) THE CITY OF LOS ANGELES IS AN AGENT OF THE STATE OF CALIFORNIA WITH LIMITED POWERS, WHICH DO NOT INCLUDE AUTHORITY TO PASS OR ENFORCE A CONFISCATORY RATE ORDINANCE.

The constitution of the state of California provides (art. 1, sec. 13):

> "No person shall be deprived of * * * property without due process of law."

This constitutional provision must be read in connection with any act conferring authority to fix rates, and constitutes a limitation on such authority.

If, therefore, the ordinance attacked in this action is confiscatory, it is not authorized by the state. On the contrary it is in direct violation of the organic act of the state.

(b) ACTION BY THE CITY OF LOS ANGELES IN THE EXERCISE OF A STATE AGENCY, BUT NOT WITHIN THE LIMITS OF ITS AUTHORITY FROM THE STATE, IS NOT STATE ACTION.

It is an elementary principle of the law of agency, hardly necessary to be stated, that an unauthorized act of an agent is not the act of the principal. In other words, the scope of the agent's authority measures the principal's responsibility.

But what elements enter into the question of authority and what determines the "scope of an agency"? Appellant calmly assumes throughout the argument on its behalf that an act, merely in the exercise of an agency, is the act of the principal, regardless of known limitations upon the extent to which such exercise of agency is authorized to be carried. It is calmly assumed that because the city of Los Angeles is given certain authority in the field of public utility rate fixing, any act it may assume to perform *in that field* is the act of the state of California.

Is appellant's assumption warranted by the law? We are told in the course of the opinion of this court in Mechanic's Bank of Alexandria v. Bank of Columbia, 18 U. S. (5 Wheat.) 326, (5 L. Ed. 100) that

"The liability of the principal depends upon the facts; 1. That the act was done in the exercise, and 2. Within the limits of the powers delegated."

This is the invariable rule as between principal and agent and as between principal and all persons having knowledge of the limitations upon the agent's authority.

In private business transactions the scope of the agent's authority is sometimes held to be broader than the authority actually conferred, *as to persons having no knowledge of limitations upon the agent's authority.* Upon principles of estoppel an "ostensible agency" is said to arise, the extent of which agency is measured by the powers with which the principal has apparently clothed the agent.

But the principles of ostensible agency have no application to a public agent. The powers of such agent are defined by law of which all persons are deemed to have knowledge, hence the authority actually conferred always determines the scope of such agency. On principle it would seem, therefore, that the city of Los Angeles is the agent of the state of California with authority to fix rates, subject to the limitation that it shall not fix a confiscatory rate; that the act of the city, done (1) *in the exercise*, and (2) *within the limits* of its authority would be the act of the state. But that if, as alleged, the city has passed

a confiscatory rate ordinance, it has performed an act in the *exercise* of its agency but *not within the limits* of its authority.

Appellant in effect admits that if the city of Los Angeles had not been authorized to fix rates its assumption of authority to pass a rate ordinance would not make such act the act of the state. No criticism is offered upon such cases as Louisville v. Telephone Company, 155 Fed. 725, (discussed by appellant, brief pp. 95-6), where federal jurisdiction was denied on the ground that the defendant city of Louisville had not been granted authority to fix rates, hence its act, in assuming to pass a rate ordinance, could not be charged to the state of Kentucky and was not state action. Then why should appellant ask the court to ignore the other equally important element entering into the question of the agent's authority—*limitations* upon the extent of delegated powers? Appellant would scarcely deny that, if its allegation is true that the rate ordinance passed by the council of the city of Los Angeles is confiscatory, it is void under the state law. Why is it void under the state law? Because it is in excess of the authority of the city.

The vice in the entire argument of appellant—the essential weakness in its case, lies either in the assumption that the state of California has delegated to the city of Los Angeles *unlimited authority* in the matter of rate fixing or that limita-

tions upon an agent's delegated authority are of no consequence in determining the responsibility of the principal.

The former alternative position could scarcely be maintained. If appellant comes forward with the assertion that the rate ordinance of the city of Los Angeles is confiscatory, it has but to turn to the constitution of the state of California to learn that it is just such ordinances that the city of Los Angeles is forbidden to enforce.

But appellant seems to plant itself upon the other alternative—seems to take the position that if an agent is given some general authority, limitations upon that authority do not operate to deprive the act of the agent, in excess of his authority, of its character as an act of the principal. We are told, at page 75 of appellant's brief, that "of course it is not every act done by a state officer which can thus be charged to the state. If he acts entirely outside the scope of his authority, so that his act derives no legal effect or consequence because of his official character, such acts are no more the acts of the state than if the officer held no official position or authority at all. Such, essentially, was the nature of the act in the Barney case. A mere assertion of authority by an officer, or even an attempt to exercise it, is not enough to establish it." We shall not quarrel with that statement. But perhaps we may not agree with counsels' interpretation of it nor with

the application they impliedly make of it. In the first place, we should probably disagree with counsel as to the meaning of the term "scope of the officer's authority." We have tried to show that the scope of the authority of a public officer or agent, with powers defined by law, is the authority actually conferred and that any act *in excess of the officer's authority is an act without "the scope of his authority"* and not binding upon the state.

The statement, "If he acts entirely outside the scope of his authority so that his act derives no legal effect or consequence because of his official character, such acts are no more the acts of the state than if the officer held no official position or authority at all," is not to be quarreled with unless, by the use of the word "entirely," appellant means to imply that there is a sort of twilight zone, within the confines of which, a public officer, acting without the scope of his known authority, may nevertheless bind his principal. We contend that there is no such supposed twilight zone—that if the officer's act is in excess of his authority—if it is "outside his authority" it is *"entirely* outside his authority," and his act is not the act of the principal. We repeat that it is settled law that the "scope of an agency" is the authority actually conferred, where knowledge of that authority is shown, and that in the case of a public

agent, with powers defined by law, the authority actually conferred is the scope of the authority.

Of course we would not be understood as contending that wide discretionary power may not be conferred upon an agent. Nor would we suggest that with *unlimited* discretionary power, the agent's act would be void, merely because his discretion was unwisely or improperly exercised. What we do contend is that *limits may be fixed* beyond which an exercise of discretionary power may not extend. When limits are fixed the scope of the agency is the field thus fixed and limited.

The above quoted statement from appellant's brief also indicates that it is counsels' contention that the act of a public officer, outside, but not *"entirely outside"* the scope of his authority, may derive "legal effect or consequence" because of the officer's official character and hence may be regarded as the act of the state notwithstanding the officer's want of authority. Upon just what legal principle this contention is based we are not advised. Nor are we informed in that section of appellant's brief at page 25 *et seq.*, where the same idea is advanced under the caption "Nature and Effect of Legislative Regulation of Public Utility Rates in its Bearing on the Jurisdictional Question Here Involved."

We are told in this section of appellant's brief of the difficulty and expense of nullifying in the courts an unconstitutional rate ordinance. But

we are not told what bearing this has on the jurisdictional question. It is not clear to us how the act of the city in passing an alleged confiscatory rate ordinance, which by reason of its confiscatory character, the state has forbidden the city to pass or enforce, becomes the act of the state, merely because the passage of such ordinance by the city places upon appellant the burden of fighting the ordinance in the courts.

Let us concede for the purposes of the argument that the placing upon appellant of the burden of contesting an unconstitutional rate ordinance, at great expense to itself, is unjust and unwarranted and operates to deprive appellant of its property without due process of law. The question still remains—"by whose act is the confiscation worked?" Does the *mere magnitude* of the burden—the *extent of the deprivation,* make the act that of the state? May the state reasonably be expected to make laws that are self executing,—that are so framed that its citizens may never be subjected to the necessity of resorting to the courts for protection?

If appellant shall be permitted to resort to federal jurisdiction will its burden be materially lessened? Is it more difficult to establish the unreasonableness of a utility rate in the state court than in the federal court? And how does appellant's situation in this regard differ from that of the complainant in Barney v. New York? Cer-

tainly not in *kind but merely in degree* of deprivation. How does it differ from that of complainant in City of Louisville v. Cumberland Tel. Co., 155 Fed. 725? We are told in the opinion of District Judge Evans (155 Fed. 726) that

> "the bill * * * in substance and effect, avers that the defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate the plaintiff's property; and that thus it would be deprived thereof by the city without due process of law, and in violation of the fourteenth amendment to the constitution of the United States."

By reason of other averments in the bill the learned Circuit Court of Appeals decided that there was no federal jurisdiction and the complainant was dismissed hence, notwithstanding the fact that if its complaint was well founded in fact, it faced the same onerous burden described by appellant in its brief (pp. 25-42). In other words, the *mere extent of the burden* placed upon the complainant in that case—the mere "legal effect or consequence" attaching to the act of the city of Louisville, because of the official character of the act, did not operate to make it the act of the state of Kentucky.

We submit that according to elementary principles of the law of agency, the act of the city of Los Angeles, done *in the* exercise of its agency, but *not within the limits* of its authority, is not the act of the state of California; that consequences attaching to the unauthorized act of the city have no bearing on the matter.

Having considered on principle the effect of the city's want of authority on the question of federal jurisdiction, we may next inquire how stands the matter upon the authorities dealing specifically with this question of jurisdiction. This brings us to the consideration of our third point:

III.

An Unauthorised Act of a State Agent is Not, Under the Authorities, State Action, Within the Meaning of the Fourteenth Amendment to the Constitution of the United States.

We think that the decisions of this court and of the inferior federal courts fully warrant the above conclusion. While the courts have not always discussed or made clear the principle underlying their decisions they have quite consistently held that an *unauthorized act* of a state agent is not within the inhibition against state action, contained in the fourteenth amendment to the constitution. The fact that the courts most frequently have had to consider cases where an alleged state agent had performed an *ultra vires*

act—where the agent had assumed to do an act on behalf of the state which was not "an exercise" of any delegated authority, by no means warrants the conclusion that the other element—action *within the limits* of delegated authority—may be ignored.

In the course of the opinion in the case of Huntington v. City of New York, 118 Fed. 683, it is said:

> "The inhibition of the fourteenth amendment is against action by a state depriving an individual of his property. * * * A state acts by agents and the inhibition runs against all who are in fact such agents, *acting within the scope of an authority* conferred upon them by the state." (Italics ours.)

Continuing, the learned court says:

> "Now, in the case at bar, the first question to be considered is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel, which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing. It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to a conclusion which should determine upon a route and general plan sufficiently detailed to show the

'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit."

Referring to the facts involved in the case at bar we find that the state of California has authorized the city of Los Angeles to fix rates to be charged by public utility corporations for service rendered to its citizens, but *subject to* this important *qualification* that *said city shall fix no confiscatory rate.* May it not be said in this case, as it was said in substance, in Huntington v. New York: When the city departs from its instructions, and fixes a confiscatory rate, whatever trespass upon private rights it may commit is one which the state has not only not authorized it to commit, but under any fair interpretation of the law, has forbidden it to commit.

No one would deny that if the ordinance is confiscatory, it is void under the state constitution. Why is it void? Simply because it is unauthorized and contrary to the supreme law of the state.

The decision in Huntington v. New York was affirmed by this court (193 U. S. 44) upon the

opinion in Barney v. New York, 193 U. S. 430, a case which involved the same facts.

In the course of its opinion in Barney v. New York, *supra*, affirming the decision of the Circuit Court, this court said:

> "Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the 14th amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.
>
> "Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the state had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. Missouri v. Dockery, 191 U. S. 165, ante, 133, 24 Sup. Ct. Rep. 53; Civil Rights cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667."
>
> (48 L. Ed. 740.)

In the case at bar we submit that "it is for the state courts to remedy the act" of the city of Los Angeles "done without authority of, and contrary to the state law."

City of Louisville v. Cumberland Tel. & Tel. Co., 84 C. C. A. 151, 155 Fed. 725, was a proceeding in equity to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Louisville, on the ground that the rates prescribed were unreasonable, unjust and confiscatory, and, if enforced, would deprive complainants of their property without that due process of law guaranteed by the fourteenth amendment. The learned court, after quoting certain allegations of the bill to the effect that the defendant city had not been given authority by the constitution and statutes of Kentucky to pass the ordinance in question, said:

> "If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the force and effect of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises." (155 Fed. 729.)

Note that the court observes, in that part of its opinion quoted above, that "to be given the force and effect of a law of the state, it (a city ordinance) must have been enacted in the exercise of some legislative power conferred," etc. If a city ordinance must have *"the force and effect of*

a law of the state" in order that it may be considered state action, surely an ordinance in direct violation of the state constitution is not state action, for it has no force or effect whatever.

The bill, in the last above entitled cause, having alleged that the state had not delegated authority to the city to legislate upon the subject of rates, the court very properly pointed out that, if such allegation were true, the ordinance attacked had not been passed "in the exercise" of a power conferred by the state, hence the ordinance was not chargeable to the principal—the state, and was not "state action." That was as far as the learned court was required to go in disposing of that case. But as we have already suggested, in order that an act of an alleged agent may be deemed the act of the principal, the agent must have acted "within the scope of his authority," as well as "in the exercise of his agency."

In the case at bar the city was given authority to legislate upon the matter of rates, subject to the limitation that it must not fix an unreasonable rate. If, with such limitations upon its authority, the council of the city did, as appears from this bill, arbitrarily ignore and override the recommendations of its statistical board, and did fix an unreasonable, confiscatory rate, how can it be said that the act of the city was within the limits of its authority and was the act of the state?

The learned Circuit Court of Appeals, in its opinion in the Cumberland case, *supra*, said:

> "There was no state authority behind the action of the Louisville common council,"

hence its action was not state action. May it be said that there is any *state authority* behind the action of the Los Angeles city council, if that action was in direct violation of the supreme law of the state? Does the state authorize an act which its constitution prohibits and makes void?

> "There can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law."
>
> City and County of S. F. v. United R. R. of S. F. (C. C. A.) 190 Fed. 507.

And there can be no difference in principle between an ordinance enacted in violation of a general statute of the state and an ordinance enacted in violation of the supreme law of the state, the constitution. How may a state be said to deprive its citizen of his property without due process of law, when the alleged act of deprivation is confessedly made void by the supreme law of the state, and its courts are open to him to have the act so adjudged? It is said by Judge Cooley (Const. Limitations, 7th ed. pp. 259, 260):

"When a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is also true as to any part of an act which is found to be unconstitutional and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

The very allegations of fact that complainant must make in order to state a case for relief under the 14th amendment establish, if true, the conclusion that the ordinance was unauthorized by the state and that it is absolutely void under the state law. Is a citizen of a state justified in going, or may he be permitted to go to the courts of the United States complaining that *his state* is attempting to deprive him of his property without due process of law, when he confesses that, if the matters and things involved in his complaint are true, the law of his state makes the act of alleged deprivation null and void and of no effect? We think not.

In the comparatively recent case of Memphis v. Cumberland Telephone Company, 218 U. S. 624, this court had under consideration the question of federal jurisdiction to grant relief from

an alleged confiscatory rate ordinance passed by the city of Memphis. In the course of its opinion, declaring against the existence of federal jurisdiction, this court reviews and approves many of the above cited decisions. Speaking by Mr. Justice Day, this court says:

> "It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the state, and its attempted passage it is alleged was an abuse of power by the city. There is no reference in the bill to any provision of the Federal Constitution. If any can be said to be violated, it must be the fourteenth amendment. It is hardly necessary to say that that amendment is aimed at state action, in the provision that no state shall deprive any person of life, liberty or property without due process of law. The bill, therefore, so far from charging a violation of the fourteenth amendment by an authorized action of the state, distinctly and in terms avers that the ordinance was passed without state authority. That such municipal legislation does not lay the foundation of federal jurisdiction has been repeatedly held in this court. Hamilton Gas Light Company v. Hamilton, 146 U. S. 258, in which many of the previous cases in this court are cited. In that case Mr. Justice Harlan, speaking for the court, said of an ordinance passed without legislative authority: 'A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States.'
>
> "In Barney v. City of New York, 193 U. S. 430, the bill invoked the jurisdiction of the Circuit Court of the United States upon

the ground that the plaintiff was deprived of his property without due process of law; other allegations of the bill showed that the matters complained of were not only not authorized, but were forbidden by the legislation of the state, hence the action did not invoke the protection of the fourteenth amendment because of action by the state of New York, and therefore it was held the bill was properly dismissed for want of jurisdiction. In that case some of the previous cases in this court, to the same effect, are reviewed by Mr. Chief Justice Fuller, who delivered the opinion of the court.

"A question closely analogous to the one at bar came before the Court of Appeals of the Sixth Circuit, Judge Lurton delivering the opinion of the court. City of Louisville v. Cumberland Telephone & Telegraph Co., 155 Fed. Rep. 725. In that case the jurisdiction of the Circuit Court was invoked on the ground that the ordinance of the city of Louisville regulating rates was in violation of a contract between the complainant and the city; also on the ground that the rates were unreasonable, unjust and confiscatory, depriving the complainant of property without due process of law, in violation of the fourteenth amendment of the constitution. In that case the bill was dismissed upon the ground that the allegations of the complaint showed that the case was not one arising under the constitution and laws of the United States. This was held to be so because of other statements of the bill, which it was held negatived state action, which alone could lay the foundation of jurisdiction, in that it averred that no power to regulate the rates charged by the complainant had been granted by the state of Kentucky to the mu-

nicipality which had undertaken to pass the regulating ordinance, and that the attempt to pass such ordinance was an unwarranted and unfounded assumption of power upon the part of the city.

"The claim that the jurisdiction should be sustained because the common council of the city of Louisville had assumed to act under authority of the legislature of the commonwealth of Kentucky, which was averred in the bill, was answered by the court saying that the existence of such regulating power was distinctly negatived by the allegation of the bill that the city had acted in the premises wholly without authority.

"So, in the present case, the statements of the bill are clear and distinct that the passage of the ordinance was without power, and a usurpation on the part of the city; and the allegations of the bill as to the confiscatory character of the ordinance can, consistently with the other averments of the bill, be referred only to the state constitution, which, as well as the federal constitution, inhibits attempts to take property without due process of law."

Appellant attempts to distinguish this and other cases upon which we rely, on the ground that *the allegations of the bill*, in these cases, showed a want of state authority for the act in question, while in the case at bar, the bill alleges that the act was done by authority of the state.

Appellant says (brief):

"It will not have escaped the notice of this court that in every one of the cases relied on in support of the defendant's objection, and which we

have above reviewed, the pleadings of the complainant itself alleged the lack of state authority for the acts complained of. Of precisely opposite character is complainant's bill in this case, which affirmatively alleges the delegation of authority by the state to the defendant city to prescribe rates to be charged by the complainant and other public utility corporations. This consideration alone, we submit, is sufficient to distinguish our case from those which were supposed to be adverse to our contention."

We do not see that the alleged point of distinction is at all material. If the cause came before the court on demurrer to the bill, its allegations alone would be considered. But this cause comes up on bill and plea. It is the office of a plea in equity to supply a missing or additional fact which should be considered in connection with the bill.

Farley v. Kittson, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534;
United States v. Peralta, 99 Fed. 624.

Of what possible importance is it whether the *bill* alleges absence of state authority or not, provided this appears from the bill, read in connection with a plea, whose truth is confessed?

As we view the matter, *this record shows* that the city of Los Angeles had power to fix utility rates, subject to the limitation that it should not fix a rate that would operate to deprive any person of property without due process of law.

Expressed differently, we think it sufficiently appears *from this record,* as it is stated to have been averred in the bill considered in Louisville v. Cumberland Tel. Co., 155 Fed. 725, that

> "Defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate plaintiff's property and thus it would be deprived thereof by the city without due process of law, and in violation of the fourteenth amendment to the constitution of the United States."

When *the record shows* that the city of Los Angeles had no authority from the state to fix other than reasonable rates, but that it nevertheless proceeded to fix an unreasonable confiscatory rate, action in excess of state authority is shown. Our authorities do therefore apply.

In the course of his review of the authorities, the learned judge who heard this matter at circuit made the timely observation that no case had been cited where the Supreme Court of the United States had held that an ordinance of a city, manifestly in violation of an express provision of the state constitution, is action by the state. We know of no decision of this court to that effect and counsel have cited none. We do

not anticipate that there will be any such decision until this court is prepared to affirm that the unauthorized act of an agent is the act of the principal, and that a state deprives its citizen of his property by an act of a state agent which never had any validity under the state law.

IV.

The Result of this Suit Does Not Depend Upon the Effect or Construction of the Fourteenth Amendment, Hence the Suit is Not One Arising Under the Constitution or Laws of the United States.

Recent decisions indicate that the claim of federal jurisdiction herein should fail for the above stated reason.

In Memphis v. Cumberland Telephone & Telegraph Co., *supra*, an action involving telephone rates in the city of Memphis, it was alleged in the bill that the ordinance was passed without authority of the state and that its attempted passage was an abuse of power by the city, and this court said:

> "We said by the chief justice, in Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U. S. 239; 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, *upon the determination of which the result depends*, it is not a suit arising under the constitution or laws.'"

Under the allegations of the bill and of the plea, the determination of the case at bar does not depend upon the construction of the fourteenth amendment to the constitution of the United States. The complainant has alleged that the ordinance is confiscatory. If that be so it was passed contrary to the mandate of the state, contrary to the law of the state and is not the action of the state.

If the fourteenth amendment had never been passed *the result of this suit should be exactly the same.* If the ordinance attacked is confiscatory it is void, regardless of the fourteenth amendment. *This suit does not* therefore *involve a controversy, the result of which depends,* in any degree, *upon the effect of the fourteenth amendment* or upon the effect of any other law of the United States.

Two decisions, much in point upon the matter here involved, have recently been rendered by the Circuit Court of Appeals for the Ninth Circuit. *Seattle Electric Company v. Seattle R. & S. Ry. Co.,* (C. C. A.) 185 Fed. 365, and City and County of San Francisco v. United R. R. Co. of San Francisco (C. C. A.) 190 Fed. 507, declare in substance, that no question involving the effect or construction of the fourteenth amendment arises where the state constitution contains a similar provision.

Seattle Electric Company v. Seattle R. & S. Ry. Co., *supra*, was an action brought by a street railway corporation owning a franchise over a street in the city of Seattle. Complainant's franchise not being exclusive, the city council granted a second franchise to another street railway corporation, authorizing the latter to occupy the same street with its tracks. In the granting of that franchise provision was made that no tracks should be laid until the amount of damage had been ascertained and arrangements for compensation made with the owner of the first franchise. The bill was filed upon the ground that notwithstanding these provisions of the ordinance, tracks were being laid and the complainant was being deprived of its property without due process of law and contrary to the provisions of the fourteenth amendment to the federal constitution. After discussing the provisions of the ordinance, the court, speaking by Judge Morrow, said:

> "But there is a further and, as we believe, a conclusive objection to the claim of right on the part of the complainant to invoke the jurisdiction of the Circuit Court on constitutional grounds. It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of provisions of the federal constitution. If it should be conceded that in some view of the ordinance and defendant's action, under color of its provisions, there would be a taking of complainant's property without due process of law,

still it would not follow that the Circuit Court had jurisdiction of the case unless the ordinance in that respect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides in Article 1, Section 3, as does the fourteenth amendment to the constitution of the United States, that: 'No persons shall be deprived of life, liberty or property without due process of law.'

"Under this provision of the state constitution the ordinance would be as invalid as under the federal constitution. It would be with respect to the former as the complainant charges in its complaint with respect to the latter, 'without authority in law, null and void, and of no force and effect.' The presumption is that the courts in Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States. 'The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case in the state court of last resort for cases of that character; and until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on a writ of error to the United States Supreme Court upon the

ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty or property without due process of law in violation of the fourteenth amendment has at last received the sanction of the state and, in effect, become the act of the state itself.'"

In the later case of City and County of San Francisco v. United R. R. Co. of S. F., *supra*, the doctrine of the Seattle case was expressly reaffirmed.

We repeat that this case does not present a controversy, the result of which depends in any degree, upon the fourteenth amendment to the constitution of the United States; that if said amendment had never been adopted the result of this suit should be exactly the same. For that reason, and on the above authorities, there is no federal jurisdiction of the cause.

Summarizing the argument from the standpoint of appellee, we submit that the solution of the problem, presented by this case, lies in an application of the principles of agency; that, on principle, the act of an agent, done in the exercise of his agency, but not within the limits of his authority, is not the act of his principle; that, on authority, the act of a state agent in violation of authority from the state, is not action by the state; that if, as alleged, the ordinance here attacked is

confiscatory, it is void under the state law, and for that reason the cause does not present a controversy, the result of which depends upon the effect or construction of a law of the United States.

Having presented the case from the standpoint of appellee we shall now consider some arguments advanced by appellant.

V.

Appellant's Arguments Considered.

(a) DEFENDANT NOT ESTOPPED TO QUESTION JURISDICTION.

(Refers to appellant's brief, pp. 102-106.)

Appellant is concerned lest defendant may be permitted to "stultify itself" by successfully setting up its own want of authority to pass a confiscatory rate ordinance. It is urged that the court should take jurisdiction of this case because it would be wrong to permit defendant successfully to plead its own want of authority.

This is a somewhat unique argument to advance in support of federal jurisdiction. We had supposed that jurisdiction over the subject matter could not be created by the parties, either by consent or by acts of estoppel; and that it would be the duty of the court of its own motion, to dismiss a cause over which it had no jurisdiction, regardless of the conduct or attitude of the parties.

Moreover, immaterial though it may be to the matter before the court, we cannot refrain from declaring that we do not for one moment admit, except for the purpose of testing the sufficiency of the bill herein, that the ordinance attacked is confiscatory or unauthorized.

Our plea is in the nature of a speaking demurrer and does not, either in law or morals, commit us to the position assumed for the purpose of the argument. We contend that *if* the ordinance is confiscatory, it is unauthorized and not state action.

(b) That a Suitor Has His Choice of Forum is Not Denied.

(Refers to appellant's argument—brief, pp. 106-113.)

If concurrent jurisdiction existed we should, of course, concede that the suitor might take his choice of forums. For instance, if the fourteenth amendment had provided that—

"No person shall be deprived of property without due process of law," we should readily agree that appellant might attack us in either the state or the federal court. State action need not then appear, and appellant would have choice of forum.

(c) THE CONSTITUTIONAL GUARANTY OF DUE PROCESS CONTAINED IN THE CONSTITUTION OF CALIFORNIA HAS NOT BEEN IMPAIRED BY JUDICIAL CONSTRUCTION.

(Refers to appellant's argument—brief, pp. 113-122.)

We submit that an examination of the decisions of the Supreme Court of California will demonstrate that the constitutional guaranty, that acts of confiscation shall not be permitted, is as broadly and liberally interpreted there as elsewhere. Even if such had not been the case in the past, this court should not indulge the presumption that the courts of California would fail to apply the plain mandate of the state constitution in appellant's case. On the contrary, as was well said in Seattle Electric Co. v. Seattle R. & S. Ry. Co., 185 Fed. 365:

> "The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States."

Moreover, it is the duty of this court to place its own interpretation on the California constitutional provision.

The decisions of the Supreme Court of California are not before this court, and if they were

it would not alter the case. This court has before it a bill alleging an act of confiscation by an alleged state agent and a plea, designed to show, as a fact, that such alleged act was not the act of the state, because unauthorized. The question of the sufficiency of that plea is for this court to determine, and it will place its own construction on the California constitutional provision.

Indeed we may go still further and say that if the state Supreme Court should hereafter so construe the state constitutional provision in this appellant's case that due process of law shall be denied, it would be an act of ratification by the state of the unauthorized act of the city of Los Angeles.

This would make the adopted act of the city the act of the state and would form the basis for a writ of error to the Supreme Court of the United States, when it would be the duty of this court to correct the error of the California court.

For the above reasons it would seem that what the Supreme Court of California may or may not have said is wholly immaterial to this case.

(d) THE CONCLUSION DOES NOT FOLLOW THAT THE ADOPTION OF DEFENDANT'S CONTENTION HEREIN WOULD MEAN THE DESTRUCTION OF FEDERAL JURISDICTION TO ENFORCE THE GUARANTIES OF THE FOURTEENTH AMENDMENT.

(Refers to appellant's argument, brief, pp. 17-24.)

In the discussion contained in that part of its brief at page 17 *et seq.*, appellant advances the somewhat startling proposition that defendant's contention in this case, if followed to its logical conclusion, would mean the destruction, not only of all original jurisdiction of the federal courts to enforce the guaranties of the fourteenth amendment, but would also take away the jurisdiction of this court to enforce the amendment by reviewing the decisions of state courts.

Appellant says, (brief, pp. 18-19), that if it is true that a city has no authority to do that which the state constitution forbids,

"* * * certainly it must be just as true that no officer or agent of the state can be given authority to do that which the constitution of the United States forbids; for that instrument itself declares that it is the supreme law of the land. * * * If it were true, then that within the meaning of the fourteenth amendment no act forbidden by a state constitution could be deemed to be the act of the state, so as to give federal courts jurisdiction to restrain or redress it, until the state courts have sanctioned such act, then the same must be equally true of any act forbidden by the federal constitu-

tion; and thus all original jurisdiction of the federal courts to enforce the guaranties of the fourteenth amendment would be destroyed in every state whose constitution contains a like guaranty.

"* * * furthermore, * * * if a case in which denial of due process is charged were brought to this court on appeal or writ of error to the court of such a state, and this court should therein determine that the charge were true, this would only establish, if defendant's contention here is correct, that the act complained of was done in violation of the constitution, and therefore without the authority of the state, and so was not prohibited by the federal constitution or remediable by this, or any federal court."

This argument would seem to indicate an entire lack of comprehension of the real basis of our contention. It never has been contended by defendant that an act could not be deemed to be the act of the state *simply because such act violated law.* Rather has it been our contention that an *act of* an alleged *agent could not be deemed* to be the *act of* his *principal, if* it was found to be *in excess of* his *authority;* that the constitution of the state was to be deemed to be in the nature of a general order to subordinate agencies of the state; that the alleged act of the city, in this case, could not be deemed to be the act of the state, because in excess of the city's authority, and null and void under state law.

But the city is not an agent of the federal government. It is a state agent, hence it does not follow that responsibility for an act could be de-

nied, solely because it violated the federal constitution. The city is a mere subordinate agency of the state, controlled by and responsible to the state. It is because the city's act is in excess of the city's authority from the state, not because it violates law, that it is not state action.

If the ordinance in question is confiscatory, it violates appellant's constitutional rights. But what constitutional rights? Not its rights under the federal constitution, because the act is not an act of the state. It is to the city's principal, the state, that the fourteenth amendment is directed. When, however, the act of the city is called in question before the Supreme Court of the state—the body provided by the state to pass on such matters for the state, and that body determines that an act of confiscation is not such, then may it be said that the state has ratified and confirmed the confiscatory act and made it the act of the state. The injured party may then come before this court, by writ of error, and rightfully complain that *his state* deprives him of his property without due process of law.

It is true that the principle for which we contend, that the state must ratify and confirm an act of a city government, which violates the state constitution, before federal jurisdiction under the fourteenth amendment shall attach, would oust the inferior federal courts of original jurisdiction *in all similar cases*. Whether this principle

should be extended so as to include those agencies which constitute the state government, which act for the state, and in the name of the state, and which, for some purposes, may be regarded as the state, is a question not now before the court. Logically, we should say that no act of any state agent, in excess of his authority and in violation of the state constitution, should be held to be the act of the state until that act had been ratified by the state, by the declaration of its Supreme Court, the body provided by the state to pass on the question of the constitutional authority of state agents.

This court, however, has indicated that where one "acts in the name of the state and for the state and is clothed with the state's powers, his act is that of the state." (Raymond v. Chicago Union T. Co., 207 U. S. 20; 52 L. Ed. 78.) Whether by the above statement the court is to be understood as meaning that one who, acting for and in the name of the state, is doing an act in violation of the state constitution, and which, presumptively, the state will enjoin and prevent if appealed to, may be said to be "clothed with the state's powers" is a matter we need not here consider. As indicated by the learned circuit judge, in his opinion herein, there is an important difference between the act of a state officer, acting for and in behalf of the state and in the name of the state, and the act of a subordinate agency,

such as a city government which does not act for, or in the name of the state, and does not represent the state, except in a limited sense.

As to these subordinate state agents, at least, we submit that it would violate a thoroughly established principle of agency to hold their unauthorized acts to be the acts of the state.

Even if it be agreed, however, that the logical result of our contention would be the destruction of all original jurisdiction of the inferior federal courts, in cases arising under the fourteenth amendment, we can not see how that consideration is material. The court is here *applying* the law and the constitution. It is not engaged in *making* either. It is applying a constitution which says that no state shall deprive any person of property, not one which says that no person shall be deprived of property. Nor is it applying a constitution which provides that no *city* shall deprive any person of property.

Let us not be led into an indefensible position in an effort to retain a jurisdiction which does not exist. If it is desirable that the inferior federal courts should have a jurisdiction that they do not lawfully possess, let the constitution be changed.

As for the inferior federal courts, congested with a mass of litigation of this character which it was never intended that they should handle, and which should be taken care of in the state courts, they will doubtless grieve but little over

its loss. As for the litigant, we have shown that he has his remedy as against an erroneous state judgment which operates to deprive him of his property without due process of law.

(e) THE PENAL PROVISIONS OF THE ORDINANCE DO NOT OPERATE TO DENY TO APPELLANT THE EQUAL PROTECTION OF THE LAW, NOR DOES THAT PHASE OF THE CASE PRESENT AN INDEPENDENT GROUND FOR FEDERAL JURISDICTION.

(Refers to appellant's argument—brief, pp. 123-132.)

In the closing pages of its brief, (pp. 123 *et seq.*), appellant sets forth, what it terms an "independent ground of federal jurisdiction." Attention is directed to the case of *Ex parte* Young, 209 U. S. 123, where it substantially was held that the allegation that the penalties provided in certain state legislation were so enormous as to prevent the corporation affected from applying to the courts for relief, amounted to a declaration that the corporation had been denied the equal protection of the law, and presented an independent ground of federal jurisdiction. It is then argued that the ordinance here in question provides a severe penalty; that the constitution of California contains no provision guaranteeing the equal protection of the law, and the conclusion is drawn that this presents an entirely independent ground of federal jurisdiction.

Is it an independent ground of federal jurisdiction? This leads us once more to inquire, "against whom is the fourteenth amendment directed?" Does the amendment guarantee that no person shall be denied the equal protection of the law, or does it declare that *no state* shall deny such equal protection? If the act of the city was unauthorized by the state because confiscatory, it is not the act of the state.

The denial of the equal protection of the law, then, is not the act of the state. Since the fourteenth amendment does not declare that *no city* shall deny to any person the equal protection of the law, no independent ground of federal jurisdiction is presented.

Independently of the above consideration, we submit that appellant's claim of denial of equal protection is untenable. A moment's consideration will show how inapplicable to this case is the doctrine of *Ex parte* Young, *supra,* on which appellant bases its argument. The court there had under consideration an application for a writ of habeas corpus to test the validity of a commitment for contempt. The petitioner had been committed for violating an injunctive order of the Circuit Court of the United States. The validity of the order of commitment depended upon the jurisdiction of the Circuit Court of the United States over a proceeding in equity, theretofore filed in that court by citizens of Minnesota. That

proceeding was instituted by *stockholders* of certain railroad corporations seeking an injunction against the authorities of the state of Minnesota to restrain the enforcement of certain rate legislation, on the ground that the rates were confiscatory.

Jurisdiction was claimed on the ground, among others, that the rate legislation prescribed penalties so drastic as to prevent the corporations in question from attempting to test it for fear of the consequences, in the event of an unfavorable result, thus denying to such corporations the equal protection of the law. As above indicated the bill was filed by *stockholders* who alleged that the corporations, their officers and directors positively refused to institute proceedings to test the law because of the ruinous consequences in the event of failure of the attack on the law.

This court said in its opinion, (207 U. S. 144):

> "Another federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question,

> at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation."

Does this record present any facts in any way analogous?

Compared with the drastic penalties described in *Ex parte* Young, the penal provision of the ordinance here in question looks harmless. It reads thus:

"Sec. 7. That any person, firm or corporation mentioned in this ordinance violating any of the provisions of this ordinance sh[illegible] be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than two hundred ($200) dollars, or by imprisonment in the city jail for a period of not more than one hundred (100) days, or by both such fine and imprisonment."

Appellant appears to have regarded it as being in fact as harmless as it looks.

The action here is not by stockholders. No refusal by this corporation to test the law. On the contrary, it rushes to the courts at the first opportunity and applies for an injunction. It would seem that the ordinance here in question was not so drawn as to prevent attack by the corporation.

In either aspect of the case at bar there is no *independent* ground for federal jurisdiction. In

our opinion, appellant must stand or fall according as it is held that the ordinance of the city of Los Angeles is, or is not, state action.

What are the cases relied upon to support the affirmative of the above proposition?

VI.

Appellant's Authorities do Not Support its Contention that Action by a City, in Violation of the State Constitution, is State Action.

We shall not attempt an extended review of the cases cited.

In our opinion, many of these cases have no application whatever to the problem under consideration in the case at bar. For instance, Yick Wo v. Hopkins, 118 U. S. 356, and City of Los Angeles v. Dobbins, 195 U. S. 223, are cited, and extracts from the respective opinions are quoted. In neither case was federal jurisdiction questioned. The only matter considered was whether the respective ordinances, as administered, constituted a proper exercise of the police power.

The necessity of a denial of due process by the *state*, in order to confer federal jurisdiction, was not even mentioned in either opinion.

Moreover both of these cases came before this court on writ of error to the highest state court, whose opinion and decision, adverse to the complainant, would amount to a ratification by the state of the action in question.

Strauder v. West Virginia, 100 U. S. 303, *Ex parte* Virginia, 103 U. S. 339, and Virginia v. Rives, 103 U. S. 313, are cited and considered. A careful examination of the several opinions in these cases, in the light of the facts involved, fails to reveal anything which may reasonably be said to be adverse to our contention in the case at bar. On the contrary a comparison of the opinions will serve but to fortify our position.

In Strauder v. West Virginia the discrimination alleged to infringe the constitutional rights of the complainant, was not a *violation of the law* of West Virginia. On the contrary, complaint was made because *the laws of the state* did not permit of service on juries of colored men. Moreover the matter was first carried to the Supreme Court of West Virginia, where the alleged discrimination was ratified by the judgment of that tribunal.

The cause then came to this court on writ of error. Under such circumstances it could hardly be contended that if there was, in fact, a discrimination or a denial of due process the act was not that of the state. This court found that the *laws of West Virginia* worked a discrimination, and the courts of that state having applied that discriminatory law, it was held that *the state* of West Virginia had violated the fourteenth amendment.

Exactly opposite was the conclusion reached in Virginia v. Rives. The record in that case presented a different situation from that revealed in Strauder v. West Virginia. Complaint was not made, as in the Strauder case, that the *constitution or laws of Virginia* denied to complainants any civil right, or stood in the way of their enforcing the equal protection of the laws. The grievance of the complainants was because of the unwarranted action of the executive officers of the state in violation of the state law. The alleged discriminatory action of these state officers, in violation of state law, had not been ratified by the state by judgment of its courts, and the complaining parties were remanded to the state court. We repeat that a comparison of the conclusions reached in these two cases and of the opinions of the court, both prepared by the same learned justice, will serve but to strengthen and fortify our position in the case at bar.

In the course of its opinion in Virginia v. Rives, the court said:

> "The petition did not assert, nor is it claimed now, that the constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is, that there were no colored men in the jury that indicted them, nor in the

petit jury summoned to try them. The petition expressly admitted that by the laws of the state all male citizens twenty-one years of age and not over sixty who are entitled to vote and hold office under the constitution and laws thereof, are made liable to serve as jurors. And it affrms (what is undoubtedly true) that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

"Now, conceding as we do, and as we endeavored to maintain in the case of Strauder v. West Va., just decided (*ante*, 664), that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offense against a state, the laws of Virginia make no such discrimination. * * * When a statute of the state denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions. * * * But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors, fails to discharge that duty in the true spirit of the law;

> if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendant's rights is denied by the state and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court."

We agree with the court that it is a "fair presumption" that the state, through its courts, will apply the constitution and laws of the state and will nullify the acts of subordinate officers in excess of their authority and in violation of state law; and that "Denials of equal rights in the judicial tribunals of the state are left to the revisory powers of this court."

Appellant has pointed out that in Virginia v. Rives the court was considering rights of accused persons under the removal act of congress and it grasps at the court's statement, obviously correct, that the amendment is broader than the removal act. But counsel do not call attention to the court's most significant declarations of the law. They place an unwarranted construction

upon that part of the opinion to which they do direct attention. Counsel say:

"In the last named case (Virginia v. Rives) it was held, as shown, that the act of officers charged with the selection of jurors, although denying a right secured by the fourteenth amendment, did not afford cause for the removal of the case into the federal courts under R. S. section 641. It was not held, however, that such acts were not within the prohibition of the fourteenth amendment; on the contrary, it was explicitly affirmed that 'the constitutional amendment is broader than the provisions of the statute'; and it was said that the act of the administrative officer there complained of, although 'a criminal misuse' of the state law, was 'the act of the state and was prohibited by the constitutional amendment.'"

We challenge the accuracy of that statement. Counsel do not point out that the court's statement was that the act of the officer in violation of the spirit of the law was but "in a sense," the act of the state. Nor do they point out that the court tells us that.

> "When a statute of the state denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions. * * * But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or can not enforce, 'in the judicial tribunals of the state' the rights

> which belong to him. In such a case it ought to be presumed the court will redress the wrong."

They do not lay stress on the court's statement that

> "If, as in this case, the subordinate officer whose duty it is to select jurors, fails to discharge that duty in the true spirit of the law, * * * it can with no propriety be said the defendant's right is denied by the state and cannot be enforced in the judicial tribunals."

Such a quotation would point too unerringly to the conclusion that—if in the case at bar, the city of Los Angeles, a subordinate agency of the state of California, has directly violated the spirit and the letter of the state constitution, "it can with no propriety be said that a right is denied by the state."

Neal v. Delaware, 103 U. S. 370, is another case cited and relied upon by appellant. This cause also came before this court on writ of error to the highest state court. The gist of the decision is well stated in paragraph 7 of the syllabus (26 L. Ed. 568), as follows:

> "The alleged exclusion from the grand jury that found, and from the petit jury that was summoned to try this indictment, of citizens of the African race because of their race, did not result from the constitution or laws of the state as expounded by its highest judicial tribunals; and consequently, the accused was not entitled to the removal of the

> prosecution into the Circuit Court. Such exclusion, however, if made by the jury commissioners without authority derived from the constitution and laws of the state, was a violation of the prisoner's rights under the constitution and laws of the United States which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error to the state court."

Appellant quotes from the opinion, (brief, p. 53.) Note particularly the court's language as quoted by appellant:

> "The action of those officers in the premises is to be deemed the act of the state; and *the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the constitution and laws of the United States.*" (Italics ours.)

We have no quarrel with such decisions. On the contrary, the decision accords with our contention that, if the judicial tribunals of the state fail to correct the acts of state agents, unauthorized by state law, whereby rights guaranteed by the fourteenth amendment are denied, "the remedy is ultimately in this court upon writ of error to the state court."

Such failure to correct, on the part of the state court, is an adoption by the state of the unauthorized act, and is equivalent in law to a ratification.

Scott v. McNeal, 154 U. S. 34;
Chicago etc. Ry. Co. v. Chicago, 166 U. S. 226, are also cited.

As anticipated by appellant, we shall and do claim that these decisions are of little value on the question of *original federal jurisdiction* under the fourteenth amendment. Both cases came before this court on writ of error to the state Supreme Court, and, as we have frequently pointed out, the action of the state court amounted to a ratification by the state, of the unauthorized act of its agent.

Commenting on these decisions, however, appellant says, (brief, p. 62):

"The judicial department of a state cannot be regarded as in any sense the exclusive organ of state action. It is only one of several independent and co-ordinate departments."

But the judicial department is that agency of the state vested with the state's authority to pass upon the question of the authority of state agents.

When an appeal is made to an intangible corporate principal to disavow the unauthorized act of its agent, such appeal must be made to an agent. That agent of the state government is the judicial department, whose function it is to interpret the state's constitution and laws and to determine the authority of state agencies.

Its declaration that a state agent's act was within his lawful authority should be held to be a ratification of the act by the state.

The claim could not thereafter be maintained that the act was not that of the state because unauthorized.

Raymond v. Chicago Traction Co., 207 U. S. 20, the latest case cited by appellant, and the one most relied upon, has been mentioned in the course of our review of authorities favorable to our contention.

In this case action by a state board of equalization, in carrying out a mandate from the Supreme Court of Illinois, was held to be state action within the meaning of the fourteenth amendment. The authority principally relied upon by the court was Chicago, etc., Ry. Co. v. Chicago, *supra*, a case which, as we have shown, came before this court on writ of error to the Supreme Court of Illinois. The court does not discuss the claim that the action of the board was in violation of the state constitution and laws. That *great weight must have been attached to the circumstance that the action of the board was pursuant to mandate from the state court* is clearly indicated by the dissenting opinion of Mr. Justice Holmes. In that dissenting opinion it is said:

> "Notwithstanding my unfeigned deference to the judgment of my brethren, I cannot but think that the Circuit Court was wrong in taking jurisdiction of this case. We all agree, I suppose, that it is only in most exceptional cases that a state can be said to deprive a person of his property without due process of law merely because of the decision of a court, without more. The discussion in Chicago, B. & Q. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581,

> concerned a judgment assumed to be authorized by a statute of the state, and in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know this is the first instance in which a Circuit Court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the 14th amendment."

Viewed in that light the action of the board was considered to have had the sanction and approval of the state, through the declaration of the state Supreme Court, the body whose duty it was to construe and apply the state constitution.

Having thus hastily examined appellant's authorities, we are unable to find in them anything contrary to the position taken by the court in City of Memphis v. Cumberland Tel. Co., *supra*, nor anything which would have warranted or justified the learned circuit judge in refusing to follow the decisions of the Circuit Court of Appeals in Seattle Electric Co. v. Seattle R. Co., *supra*, and San Francisco v. U. R. Co., *supra*, nor anything that would warrant or justify the reversal of the decree herein.

Especially would we emphasize the fact that not a single case is cited, where *action by a city* in violation of the state constitution or laws, has ever been held to be state action, where the question of original federal jurisdiction was raised.

The decree of the learned Circuit Court accords with sound legal principle. It follows the decisions of this court and of the Circuit Court of Appeals. It is not opposed to any decision of this court in which the facts are at all analogous.

In conclusion we ask the court to apply to this case the principle of agency involved in Memphis v. Cumberland Telephone Company, *supra*, City of Louisville v. Cumberland Telephone Co., *supra*, and cases of that type. If an act of a city may not be said to be state action unless authorized by the state, this record discloses no state action.

We submit that, assuming the truth of all of the allegations of the bill and of the plea, the confiscatory rate ordinance in question is (1) unauthorized and void under state law and is not "state action;" (2) that the ordinance being void under state law, the suit does not present a controversy the result of which depends upon the construction of the federal constitution or laws; that for the above reasons there is no federal jurisdiction, and the judgment at circuit should be affirmed.

Respectfully submitted,

JOHN W. SHENK,
City Attorney,
GEORGE E. CRYER,
Assistant City Attorney,
Solicitors for Appellees.

OPINION

HOME TELEPHONE AND TELEGRAPH COMPANY *v.* CITY OF LOS ANGELES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 610. Submitted October 28, 1912.—Decided February 24, 1913.

One, whose rights protected by a provision of the Federal Constitution which is identical with a provision of the state constitution are invaded by state officers claiming to act under a state statute, is not debarred from seeking relief in the Federal court under the Federal Constitution until after the state court has declared that the acts were authorized by the statute.

The provisions of the Fourteenth Amendment are generic in terms and are addressed not only to the States but to every person, whether natural or judicial, who is the repository of state power.

The reach of the Fourteenth Amendment is coextensive with any exercise by a State of power in whatever form exerted.

Under the Fourteenth Amendment the Federal judicial power can redress the wrong done by a state officer misusing the authority of the State with which he is clothed; under such circumstances inquiry whether the State has authorized the wrong is irrelevant. *Ex parte Young*, 209 U. S. 123, followed. *Barney* v. *New York*, 193 U. S. 430, distinguished.

Acts done under the authority of a municipal ordinance passed in virtue of power conferred by the State are embraced by the Fourteenth Amendment.

The power which exists to enforce the guarantees of the Fourteenth Amendment is typified by the immediate and efficient Federal right to enforce the contract clause of the Constitution as against those violating or attempting to violate its provision.

THE facts, which involve the jurisdiction of the District Court of a suit arising under the due process clause of the Fourteenth Amendment and the validity of an ordinance of Los Angeles, California, establishing telephone rates, are stated in the opinion.

Mr. James A. Gibson for appellant.

Mr. John W. Shenk and *Mr. George E. Cryer* for appellees:

The Fourteenth Amendment is directed against action by the States themselves and the State of California has taken no action.

The city of Los Angeles is an agent of the State of California with limited powers, which do not include authority to pass or enforce a confiscatory rate ordinance.

Action by the city of Los Angeles in the exercise of a state agency, but not within the limits of its authority from the State, is not state action. *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725.

An unauthorized act of a state agent is not, under the authorities, state action, within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Huntington* v. *New York*, 118 Fed. Rep. 683; aff'd 193 U. S. 440; *Civil Rights Cases*, 109 U. S. 3; *Barney* v. *New York*, 193 U. S. 430; *Missouri* v. *Dockery*, 191 U. S. 165; *Virginia* v. *Rives*, 100 U. S. 313; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725; *San Francisco* v. *United Railroads*, 190 Fed. Rep. 507; *Memphis* v. *Telephone Co.*, 218 U. S. 624; *Hamilton Gas Co.* v. *Hamilton*, 146 U. S. 258; *United States* v. *Peralto*, 99 Fed. Rep. 624; *Farley* v. *Kitson*, 120 U. S. 314.

The result of this suit does not depend upon the effect or construction of the Fourteenth Amendment: hence the suit is not one arising under the Constitution or laws of the United States. *Memphis* v. *Telephone Co.*, 218 U. S. 624; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *San Francisco* v. *United Railroads*, 190 Fed. Rep. 507; *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365.

Appellant's arguments considered, defendant is not estopped to question jurisdiction.

That a suitor has his choice of forum is not denied.

The guaranty of due process contained in the constitution of California has not been impaired by judicial construction. *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365.

The conclusion does not follow that the adoption of defendant's contention herein would mean the destruction of Federal jurisdiction to enforce the guaranties of the Fourteenth Amendment. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20.

The penal provisions of the ordinance do not operate to deny to appellant the equal protection of the law, nor does that phase of the case present an independent ground for Federal jurisdiction. *Ex parte Young*, 209 U. S. 123.

Appellant's authorities do not support its contention that action by a city, in violation of the state constitution, is state action. *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Ex parte Virginia*, 100 U. S. 339; *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Scott* v. *McNeal*, 154 U. S. 34; *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 226; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Memphis* v. *Telephone Co.*, 218 U. S. 624; *San Francisco* v. *Union Railroads*, 190 Fed. Rep. 507; *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The appellant, a California corporation furnishing telephone service in the city of Los Angeles, sued the city and certain of its officials to prevent the putting into effect of a city ordinance establishing telephone rates for the year commencing July 1, 1911.

It was alleged that by the constitution and laws of the

State the city was given a right to fix telephone rates and had passed the assailed ordinance in the exercise of the general authority thus conferred. It was charged that the rates fixed were so unreasonably low that their enforcement would bring about the confiscation of the property of the corporation, and hence the ordinance was repugnant to the due process clause of the Fourteenth Amendment. The averments as to the confiscatory character of the rates were as ample as they could possibly have been made. The charge of confiscation was supported by statements as to the value of the property, and the sum which might reasonably be expected from the business upon the application of the rates assailed. The confiscatory character of the rates, it was moreover alleged, had been demonstrated by the putting into effect during the previous year of rates of the same amount as those assailed which it was charged the corporation at great sacrifice had after protest submitted to in order to afford a practical illustration of the confiscation which would result.

Being of the opinion that no jurisdiction was disclosed by the bill, the court refused to grant a restraining order or allow a preliminary injunction, and thereafter, on the filing of a formal plea to the jurisdiction, the bill was dismissed for want of power as a Federal court to consider it. This direct appeal was then taken.

The plea to the jurisdiction was as follows:

" . . . that this Court ought not to take jurisdiction of this suit for that the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of this Court, for as much as the Constitution of the State of California, in Article 1, section 13 thereof, provides that 'No person shall be . . . deprived of life, liberty, or property without due process of law'; that this complainant, a citizen of the State of California, has never invoked the aid or protection of its said State to prevent the alleged taking of its prop-

erty, nor has complainant appealed to the courts of said State, nor to any of them, to enforce the law of said State."

The ground of challenge to the jurisdiction advanced by the plea may be thus stated: As the acts of the state officials (the city government) complained of were alleged to be wanting in due process of law and therefore repugnant to the Fourteenth Amendment—a ground which on the face of the bill, if well founded, also presumptively caused the action complained of to be repugnant to the due process clause of the state constitution—there being no diversity of citizenship, there was no Federal jurisdiction. In other words, the plea asserted that where, in a given case, taking the facts averred to be true, the acts of state officials violated the Constitution of the United States and likewise because of the coincidence of a state constitutional prohibition were presumptively repugnant to the state constitution, such acts could not be treated as acts of the State within the Fourteenth Amendment, and hence no power existed in a Federal court to consider the subject until by final action of an appropriate state court it was decided that such acts were authorized by the State and were therefore not repugnant to the state constitution. There is no room for doubt that it was upon this interpretation of the plea that the court held it had no power as a Federal court. The court said:

"It is true that the bill in the present case alleges, that, if the ordinance complained of 'is enforced, and your complainant thereby prevented from charging and receiving higher rates than the rates fixed by said ordinance, the State of California will thereby deprive your complainant of its property without due process of law,' etc. This charge, however, that the ordinance complained of is state action, is but a legal conclusion, while the facts alleged are, that the ordinance, if confiscatory, as shown by the bill, is directly prohibited by the Constitution of

the State, which, in article 1, section 13, expressly provides, among other things:

"No person shall . . . be deprived of life, liberty or property without due process of law.

"Thus, the case at bar comes within the rulings of the Circuit Court of Appeals in the Seattle and San Francisco cases, and is precisely covered by the conclusions of the court in the latter case as follows:

"'What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the Constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contracts have been enacted in violation of the positive law of the state.'"

It is true that in passages of the opinion subsequent to those just quoted there are forms of expression which when separated from their context might tend to justify the inference that the court thought city ordinances of the character of the one assailed could not in any event be treated as state action. But when the passages referred to are considered in connection with the context of the opinion, it is certain that those expressions were but a reiteration in a changed form of statement of the previous ground, that is to say that state action could not be predicated upon the ordinance because if it was treated as repugnant to the due process clause of the Constitution of the United States it would also have to be considered as in conflict with the state constitution. Under this hypothesis the decision was that it could not be assumed that the State had authorized its officers to do acts in violation of the state constitution until the court of last resort of the State had determined that such acts were authorized.

Coming to consider the real significance of this doctrine, we think it is so clearly in conflict with the decisions of this

court as to leave no doubt that plain error was committed in announcing and applying it. In view, however, of the fact that the proposition was sanctioned by the court below and was by it deemed to be supported by the persuasive authority of two opinions of the Circuit Court of Appeals for the Ninth Circuit, before coming to consider the decided cases we analyze some of the conceptions upon which the proposition must rest in order to show its inherent unsoundness, to make its destructive character manifest, and to indicate its departure from the substantially unanimous view which has prevailed from the beginning.

In the first place the proposition addresses itself not to the mere distribution of the judicial power granted by the Constitution, but substantially denies the existence of power under the Constitution over the subject with which the proposition is concerned. It follows that the limitation which it imposes would be beyond possible correction by legislation. Its restriction would, moreover, attach to the exercise of Federal judicial power under all circumstances, whether the issue concerned original jurisdiction or arose in the course of a controversy to which otherwise jurisdiction would extend. Thus, being applicable equally to all Federal courts under all circumstances in every stage of a proceeding, the enforcement of the doctrine would hence render impossible the performance of the duty with which the Federal courts are charged under the Constitution. Such paralysis would inevitably ensue, since the consequence would be that, at least in every case where there was a coincidence between a national safeguard or prohibition and a state one, the power of the Federal court to afford protection to a claim of right under the Constitution of the United States, as against the action of a State or its officers, would depend on the ultimate determination of the state courts and would therefore require a stay of all action to await such determination. While

this would be obviously true as to cases where there was a coincident constitutional guarantee, in reason it is clear that the principle if sound could not be confined to a case of coincident Federal and state guarantee or prohibition, since, as the Constitution of the United States is the paramount law, as much applicable to States, or their officers, as to others, it would come to pass that in every case where action of a state officer was complained of as violating the Constitution of the United States, the Federal courts in any form of procedure, or in any stage of the controversy, would have to await the determination of a state court as to the operation of the Constitution of the United States. It is manifest that in necessary operation the doctrine which was sustained would in substance cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment.

It would certainly be open to controversy if the proposition were carried to its logical result whether the only right under the Fourteenth Amendment, which the proposition admits, to exert Federal judicial power growing out of wrongful acts of state officers would not be unavailing. This naturally suggests itself since if there be no right to exert such power until by the final action of a state court of last resort the act of a state officer has been declared rightful and to be the lawful act of the State as a governmental entity, the inquiry naturally comes whether under such circumstances a suit against the officer would not be a suit against the State within the purview of the Eleventh Amendment. The possibility of such a result moreover at once engenders a further inquiry, that is, whether the effect of the proposition would not be to cause the Fourteenth Amendment to narrow Federal judicial power instead of enlarging it and making it more efficacious. It must be borne in mind also that the limitations which the proposition if adopted would impose upon

Federal judicial power would not be in reason solely applicable to an exertion of such power as to the persons and subjects covered by the Fourteenth Amendment, but would equally govern controversies concerning the contract and possibly other clauses of the Constitution.

The vice which not only underlies but permeates the proposition is not far to seek. It consists first in causing by an artificial construction the provisions of the Fourteenth Amendment not to reach those to whom they are addressed when reasonably construed; and second in wholly misconceiving the scope and operation of the Fourteenth Amendment, thereby removing from the control of that Amendment the great body of rights which it was intended it should safeguard and in taking out of reach of its prohibitions the wrongs which it was the purpose of the Amendment to condemn.

Before demonstrating the accuracy of the statement just made as to the essential result of the proposition relied upon by a reference to decided cases, in order that the appreciation of the cases may be made more salient we contrast the meaning as above stated which the Fourteenth Amendment would have if the proposition was maintained with the undoubted significance of that Amendment as established by many decisions of this court.

1. By the proposition the prohibitions and guarantees of the Amendment are addressed to and control the States only in their complete governmental capacity, and as a result give no authority to exert Federal judicial power until by the decision of a court of last resort of a State, acts complained of under the Fourteenth Amendment have been held valid and therefore state acts in the fullest sense. To the contrary the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power. By this construction the

reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted.

2. As previously stated, the proposition relied upon presupposes that the terms of the Fourteenth Amendment reach only acts done by State officers which are within the scope of the power conferred by the State. The proposition hence applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals and consequently assumes that no act done by an officer of a State is within the reach of the Amendment unless such act can be held to be the act of the State by the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorised the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

To speak broadly, the difference between the proposi-

tion insisted upon and the true meaning of the Amendment is this, that the one assumes that the Amendment virtually contemplates alone wrongs authorised by a State and gives only power accordingly, while in truth the Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed. Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong. To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima facie* would violate the Amendment, the subject must be

tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.

Let us consider the decided cases in order to demonstrate how plainly they refute the contention here made by the court below and how clearly they establish the converse doctrine which we have formulated in the two propositions previously stated. As to both the propositions, the cases are so numerous that we do not propose to review them all, but simply to select a few of the leading cases as types, concluding with a brief consideration of a few cases which are supposed to give support to a contrary view.

In *Virginia* v. *Rives*, 100 U. S. 313, the case briefly was this: An accused person sought to remove from a state to a Federal court the trial of an indictment pending against him on the ground that he was a colored person and although by the state statute he had a right to have people of his race serve on juries, that in practice on account of race prejudice they were excluded and thereby he was denied the equal protection of the laws. Two questions arose for decision—first, was the alleged exclusion a violation of the Fourteenth Amendment, and second, if it was did it afford ground for a removal of the case? Considering the first, the court said (p. 318):

"The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. . . ."

Determining whether the enforcement by the state officer of a non-discriminating statute in a discriminatory manner was within the Amendment, it was said (p. 318):

"It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal pro-

tection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court in which it is denied into a Federal court where it will be acknowledged."

Thus holding that the enforcement by a state official of a statute in a discriminatory manner although the statute might not be inherently discriminating was within the Amendment, the question of the right to remove was considered and it was decided that the removal act of Congress was narrower than the Constitutional Amendment and did not confer the right to remove.

In *Ex parte Virginia*, 100 U. S. 339, the case was this: A judge of a Virginia county court was indicted under the Civil Rights Act for excluding negroes from juries on account of their race, color, etc. The accused applied to this court for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record and a like petition was presented on behalf of the State of Virginia, and both applications were disposed of at the same time. The first issue to be determined was the meaning of the Fourteenth Amendment. The ruling in *Virginia* v. *Rives* was reiterated, the court saying (p. 346):

"They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue

of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

Answering the claim that there was no power to punish a state judge for judicial action and therefore that the charge made was not within the Fourteenth Amendment, it was said that the duty concerning the summoning of jurors upon which the charge of discrimination was predicated was not a judicial but merely a ministerial one. It was, however, pointed out that even if this was not the case, as the state statute gave no power to make the discrimination, it was therefore such an abuse of state power as to cause the act complained of to be not within the state judicial authority, but a mere abuse thereof, and that it was "idle" under such circumstances to say that the offense was not within the Amendment (p. 348).

In *Neal* v. *Delaware*, 103 U. S. 370, a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the Amendment, the language which we have quoted from *Ex parte Virginia* being reiterated.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, the enforcement of certain city ordinances was prohibited on the ground that they were within the reach of the Fourteenth Amendment. The court, reiterating the doctrine of *Virginia* v. *Rives* and *Ex parte Virginia*, held that this conclusion was sustained from a two-fold point of view—first, the terms of the ordinances, and second, in any event from the discriminatory manner in which the ordinances were applied by the officers.

In *Raymond* v. *Traction Company*, 207 U. S. p. 20, the whole subject—almost in the identical aspect which is here involved—came under consideration. The case concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a Federal court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state constitution in that the board had "disobeyed the authentic command of the State by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property," the act of the subordinate board could not be deemed the act of the State. This contention was held to be unsound and it was decided that even although the act of the board was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment. It was pointed out that as the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the Fourteenth Amendment forbade, the claim of right to prevent such act under the Fourteenth Amendment "constitutes a Federal question beyond all controversy." It was then said (pp. 35–36):

"The state board of equalization is one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation. . . . Acting under the constitution and laws of the State, the board therefore represents the State, and its action is the action of the State. The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a

state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State."

Referring to some reliance to the contrary placed upon a decided case, it was said (p. 37):

"*Barney* v. *City of New York*, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here."

The reassessment complained of was held to be repugnant to the Fourteenth Amendment.

Finally the subject was elaborately considered in *Ex parte Young*, 209 U. S. 123. Without attempting to fully state the case it suffices to say that although the proceeding was one in *habeas corpus*, the controversy in its ultimate aspect concerned the power of a Federal court to prevent the enforcement of railroad rates fixed under state legislative authority which were confiscatory. In the course of an opinion reviewing the whole field it was said (p. 155):

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

Although every contention pressed and authority now relied upon in favor of affirmance is disposed of by the general principles which we have previously stated, before concluding we specially advert to some of the contentions

urged to the contrary. 1. Much reliance is placed upon the decisions in *Barney* v. *New York*, 193 U. S. 430, and *Memphis* v. *Telephone Co.*, 218 U. S. 624. The latter we at once put out of view with the statement that on its face the question involved was one of pleading and in no sense of substantive Federal power. As to the other—the *Barney Case*—it might suffice to say, as we have already pointed out, it was considered in the *Raymond Case* and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex parte Young*, it is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the *Barney Case* it is to be observed that however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the *Barney Case* and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly at least, it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the *Barney Case* in so far as it might be found to conflict with the rule here applied. 2. In the opinion of the court below, there is a suggestion that even though the Fourteenth Amendment embraces acts of state officers to the extent and scope which we have stated, nevertheless the case here presented is not controlled by the Amendment since the case concerns not acts of officers done under state authority, but merely acts of city officials done under the authority of a municipal ordinance. But, as we have already pointed out, it was long since settled that acts done under the authority of a municipal ordinance passed in virtue of power conferred by a State are embraced by the Fourteenth Amendment.

Apart, however, from the controlling effect of the decisions rendered in cases concerning the enforcement of the Fourteenth Amendment, the unsoundness of the contention is plainly demonstrated by applying the established principle that the exercise of municipal legislative authority under the sanction of a state law is the exertion of state legislative power within the purview of the contract clause of the Constitution (Article I, § 10), declaring: "No State . . . shall pass any . . . law impairing the obligation of contracts." That this interpretation is here conclusive must be apparent, since it cannot be said that an act which is the exertion of state legislative power for the purpose of one provision of the Constitution is not the exertion of state legislative power under the operation of another constitutional provision, both being addressed to the same subject, that is, state legislative power.

And this gives rise at once to a demonstration from another and more final point of view of the incongruity which would result from maintaining the contention insisted upon. While the guarantees of the Fourteenth Amendment cover subjects not included in the contract clause, since the former embraces every manifestation of state power and the latter is concerned only with legislative power when exerted so as to impair contracts, yet the fundamental assertion of Federal power made by each Amendment is the same when the different subjects to which each is applicable are put out of view. To illustrate: The command of the Fourteenth Amendment "No State shall make any law abridging . . . nor shall any State deprive any person," etc., is in substance a manifestation of the same power exerted in the contract clause, saying "No State shall pass," etc. This being true, as it must be, the fact that from the foundation of the Government the contract clause has been enforced without any intimation that the power manifested by the

clause was restricted by limitations such as those which it is here insisted limit the power to enforce the guarantees of the Fourteenth Amendment, affords the most conclusive demonstration of the unsoundness of the contentions here made. The immediate and efficient Federal right to enforce the contract clause of the Constitution as against those who violate or attempt to violate its prohibition, which has always been exerted without question, is but typical of the power which exists to enforce the guarantees of the Fourteenth Amendment. See authorities as to the contract clause referred to in the opinion in *Ross* v. *Oregon*, *ante*, p. 150.

Reversed.